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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

STATE COMPENSATION INSURANCE FUND, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and BOBBIE SINGLETON, Respondents.	No. B177217 (W.C.A.B. No. MON 240602)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded with directions.

Robert Daneri, Suzanne Ah-Tye and Don Clark for Petitioner.

Berkowitz & Cohen and Sheldon Cohen for Respondent, Bobbie Singleton.

No appearance by Respondent, Workers' Compensation Appeals Board.

INTRODUCTION

State Compensation Insurance Fund (SCIF), a workers' compensation insurer, petitions for writ of review from a decision by respondent, Workers' Compensation Appeals Board (WCAB). The WCAB affirmed an award of increased compensation under former Labor Code section 5814, for SCIF's unreasonable delay in providing a medically prescribed motorized wheelchair for respondent Bobbie Singleton, the injured worker. SCIF contends that Singleton provided an inaccurate prescription, the correct wheelchair was obtained without unreasonable delay, and WCAB should have applied new Labor Code section 5814 pursuant to Senate Bill (S.B.) 899.[1]

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[1] All further code references are to the Labor Code.

In 2003, former section 5814 provided: "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision, or award shall be increased by 10 percent. Multiple increases shall not be awarded for repeated delays in making a series of payments due for the same type or specie of benefit unless there has been a legally significant event between the delay and the subsequent delay in payments of the same type or specie of benefits. The question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts. This delay or refusal shall constitute good cause under Section 5803 to rescind, alter, or amend the order, decision, or award for the purpose of making the increase provided for herein."

S.B. 899 was enacted on April 19, 2004. Section 42, subsection (a) of S.B. 899 restates former section 5814.

Section 42, subsection (b) of S.B. 899 adds: "This section shall become inoperative on June 1, 2004, and, as of January 1, 2005, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2005, deletes or extends the dates on which it becomes inoperative and is repealed."

Section 43 of S.B. 899, which is hereafter referred to as new section 5814, provides in relevant part: "Section 5814 is added to the Labor Code, to read: [¶] § 5814. (a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between

Singleton answers that the prescription complied with the parties' agreement, and SCIF unreasonably delayed in providing a different wheelchair. She argues further that the original award for increased compensation was an "existing order, decision, or award" within the meaning of Section 47 of S.B. 899, and new section 5814 does "not constitute good cause to reopen or rescind, alter, or amend" the award. Accordingly, the WCAB properly applied the former statute.[2]

We conclude that the delay in providing the motorized wheelchair is attributable to both SCIF and Singleton. However, we also hold that the WCAB should have applied new section 5814 to Singleton's case for the reasons stated in our concurrent opinion in *Green v. Workers' Comp. Appeals Bd.* (B171921, 2005) ___ Cal.App.4th ___ (*Green*). Accordingly, the WCAB's award under former section 5814 is annulled, and the matter is remanded to determine whether there was unreasonable delay by SCIF under new section 5814.

FACTUAL AND PROCEDURAL BACKGROUND

Singleton slipped and fell at work on March 27, 1998. She injured her back and also sustained a fractured right femur, which required surgeries and use of a wheelchair and walker.

On May 4, 1999, Singleton and SCIF, the workers' compensation insurer, entered into Stipulations with Request for Award for continuing temporary disability indemnity and medical care. SCIF also stipulated to two separate increases in compensation for

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the parties. [¶] . . . [¶] (h) This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section. [¶] (i) This section shall become operative on June 1, 2004."

[2] Section 47 of S.B. 899 states: "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

unreasonable delay of temporary disability indemnity under former section 5814, and a payment of $824.59 to resolve all claims to date under section 4650, subdivision (d).[3]

On February 8, 2001, SCIF and Singleton entered into Stipulations with Request for Award, providing that Singleton is permanently totally disabled with need for medical treatment. The agreement expressly excluded increased compensation for unreasonable delay of temporary or permanent disability indemnity or medical treatment.

The parties then entered into a compromise and release settlement agreement for $50,000, which resolved any claims of increased compensation through July 19, 2001.

In a one page report dated August 9, 2002, treating physician Denise Williamson, M.D., recommended a motorized wheelchair. On December 30, 2002, Singleton requested authorization for a new wheelchair based on Dr. Williamson's report.

SCIF's claims representative, Lillie Sepasi, wrote Dr. Williamson on or about February 6, 2003, and requested justification for the wheelchair. Apparently, justification was not provided until a motorized wheelchair was recommended by Howard Marans, M.D., in a report dated June 10, 2003.

On June 11, 2003, SCIF and Singleton entered into Stipulations with Request for Award (Stipulation) for authorization of an electric wheelchair.[4] The Stipulation provided that, "State Fund hereby authorizes the electric wheelchair to be provided to the applicant within 30 days of a prescription being provided which includes any/all details of the type, model, H.P. & size requirements, which may be needed. Applicant waives any and all penalties & interest if timely provided." The report of Dr. Marans was stated

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[3] Section 4650, subdivision (d) provided in relevant part: "If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee . . . ."

[4] Our reference to "Stipulation" is only to the agreement entered into on June 11, 2003, as distinguished from prior agreements entered in 1999 and 2001.

to be attached. The Stipulation was signed by counsel for SCIF, Roderick Daye, and approved by the workers' compensation administrative law judge (WCJ) as an award.

In a letter to SCIF's claims representative Sepasi dated June 11, 2003, and copied to attorney Daye, Singleton enclosed a prescription for an extra-wide electric wheelchair from Robert Hunt, M.D., a physician with the same medical group as Drs. Williamson and Marans. The letter also enclosed a photocopy of a Challenger Extra Wide Recliner with specifications. The documents were date-stamped received by SCIF legal department on June 13, 2003, and by Daye on June 16, 2003. A handwritten note on the letter indicates copies were sent to claims by inter-office mail on June 16, 2003.

On July 1, 2003, Sepasi faxed the prescription to PMSI, the wheelchair provider for SCIF. PMSI left a message the next day that a meeting with Singleton was required to assess her needs, and the price. Sepasi authorized the meeting, which took place after the 4th of July. On July 14, 2003, PMSI faxed to Sepasi a recommendation for a Merits motorized wheelchair at a discounted price of $8,667. PMSI explained that the Challenger is too heavy for Singleton's caregiver to lift, and it would not fit in the trunk of Singleton's car. Sepasi faxed a reply that SCIF would pay only $8,000.

In letters to SCIF dated July 28, 2003, and August 1, 2003, counsel for Singleton inquired why the wheelchair had not been provided. The Merits wheelchair was delivered on August 12, 2003. Singleton petitioned for increased compensation under former section 5814, and alleged unreasonable delay in providing the motorized wheelchair since 2002 and after the Stipulation of June 11, 2003.

SCIF and Singleton proceeded to trial. Sepasi testified that she received Singleton's letter and the prescription, and didn't know why PMSI was not contacted until July 1, 2003. PMSI informed her that Singleton had to be measured, and only the foldable Merits motorized wheelchair fit her needs. Sepasi had no prior experience ordering such wheelchairs. Sepasi's testimony varied as to when she learned of the 30-day limit to provide the wheelchair, which included dates she received the Stipulation, placed the order, and after delivery.

On April 12, 2004, the WCJ issued a Findings and Award and Orders. The WCJ found that there was a 60-day delay in providing the wheelchair which was unreasonable, and awarded Singleton increased compensation on the entire specie of medical treatment under former section 5814.

SCIF petitioned the WCAB for reconsideration. The insurer argued the increase would have the effect of quadrupling the cost of the wheelchair. This was particularly unfair in light of the inaccurate prescription supplied by Singleton, Sepasi not being aware of the 30-day limit, and the reasonable effort made to timely provide the correct wheelchair.[5]

In the report on reconsideration, the WCJ explained that Sepasi waited 18 days before contacting PMSI, and her ignorance of the 30-day deadline is no excuse since Daye had also been informed. Moreover, Singleton had needed a new wheelchair since 2002 and there had been a history of unreasonable delay by SCIF. Thus, fairness favored Singleton.

On June 29, 2004, the WCAB in a 2 to 1 decision affirmed the award of increased compensation under former section 5814 mainly for the reasons given by the WCJ.[6]

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[5] SCIF cited *State Comp. Ins. Fund. v. Workers' Comp. Appeals Bd.* (1998) 18 Cal.4th 1209 [short delay in benefits due to solitary instance of mere inadvertence in processing claim not unreasonable] and *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 869 (*County of San Luis Obispo*) [totality of circumstances, such as the size of late payment, length of delay, history of payment, and employer's actions, determines unreasonable delay]. There also should be a fair balance between prompt payment and avoidance of harsh and unreasonable increases of compensation. (*Id.* at pp. 875-879.)

[6] The WCAB majority added that Sepasi's ignorance of the 30-day limit to provide the wheelchair was not credible. And no matter what information was provided by the prescription, the 30-day deadline would not have been met because a meeting was still required, and Sepasi delayed 18 days and then bargained the price. In balancing under *County of San Luis Obispo*, the WCAB majority reasoned that Singleton's medical condition was serious, the Stipulation to provide the wheelchair in 30 days was flouted and the delay was twice the agreed time.

SCIF petitioned for writ of review, and argues that the 30-day limit was never triggered because the prescription received from Singleton did not comply with the Stipulation. Once the correct information was obtained from PMSI, the appropriate wheelchair was timely provided. Thus, there was no unreasonable delay. In any event, the WCAB should have applied new section 5814.

DISCUSSION

I. Standards of Review

This case requires us to interpret and apply applicable statutory provisions and new legislation. Courts of review interpret governing statutes de novo, even though the WCAB's construction is entitled to great weight unless clearly erroneous.[7] Factual findings supported by substantial evidence are affirmed,[8] however, reviewing courts are not bound to accept factual findings that are erroneous, unreasonable, illogical, improbable, or inequitable when viewed in light of the entire record and the statutory scheme.[9]

II. Principles of Statutory Construction

Generally, in interpreting legislation, we first look to the plain or ordinary meaning of the language used to determine the Legislature's intent, unless the language is

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The WCAB dissent indicated that the increased compensation was disproportionate to the circumstances under *County of San Luis Obispo*, considering the pending meeting and that a different wheelchair was ultimately provided. The dissent also pointed out that since the prescription did not comply with the Stipulation, the 30-day period never commenced.

[7] *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515-516; *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828.

[8] *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*).

[9] *Western Growers, supra,* 16 Cal.App.4th at page 233; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.

uncertain.[10] Every word and clause is given effect so that no part or provision is useless, deprived of meaning, or contradictory.[11] If more than one interpretation is reasonable, the language is interpreted consistent with the purpose of the statute and the statutory framework as a whole, using rules of construction or legislative history in determining legislative intent.[12]

When new legislation repeals statutory rights, the rights normally end with repeal unless vested pursuant to contract or common law.[13] In workers' compensation, where rights are purely statutory and not based on common law,[14] repeal ends the right,[15] absent

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[10] *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 (*DuBois*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*).

[11] *DuBois, supra,* 5 Cal.4th at page 388; *Moyer, supra,* 10 Cal.3d at page 230.

[12] *DuBois, supra,* 5 Cal.4th at pages 387-388, 393; *Moyer, supra,* 10 Cal.3d at page 230.

[13] *Governing Board v. Mann* (1977) 18 Cal.3d 819 (*Governing Board*) [authority to dismiss teacher for marijuana possession under Education Code ended by repeal implied under Health and Safety Code enactment during appeal]; *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1 (*Southern Service*) [law allowing taxpayer refund repealed during appeal ends right]; *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 76-78, 80-81 [judgment final after appeal despite subsequent repeal of statute and appeal of denial of motion for new trial].

[14] *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997 (*Graczyk*). In *Graczyk*, the court of appeal ruled that the Legislature intended an amendment to section 3352, which excluded student athletes as employees, to apply retroactively to the prior date of injury. Where a right depends on statute and not common law as in workers' compensation, repeal of the statute destroys the right unless reduced to final judgment or the statute has a savings clause. (*Id.* at pp. 1002-1003, 1006-1007.) Repeal is justified because statutory remedies are pursued with the realization that the Legislature may abolish the right to recovery at any time. (*Id.* at p. 1007.) Although the law in force at the time of injury normally controls in workers' compensation, the Legislature clarified that the amendment is "'declaratory of, the existing law'" and the "'provisions shall apply to all claims filed for injuries occurring prior to the effective date of this act.'" (*Id.* at pp. 1005-1008.)

a savings clause.[16] Rights end during litigation if statutory repeal occurs before final judgment; by definition there is no final judgment if an appeal is pending.[17] There is no injustice if statutory rights end before final judgment because parties act and litigate in contemplation of possible repeal.[18]

When new legislation amends or adds statutory rights, the legislation is applied prospectively unless it is clear from statutory language or extrinsic sources that the Legislature intended retroactive application.[19] If the Legislature's intent is unclear,

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[15] *Southern Service, supra,* 15 Cal.2d at pages 7-8; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at page 67; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 (*Beckman*); *Graczyk, supra,* 184 Cal.App.3d at pages 1006-1007.

[16] Section 4 is a savings clause. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206-1208 (*Evangelatos*) [Proposition 51 is prospective unless clear legislative intent retroactive].) Section 4 states: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."

[17] *Governing Board, supra,* 18 Cal.3d at pages 829, 831; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at pages 77, 79-80; *Beckman, supra,* 4 Cal.App.4th at pages 488-489.

[18] *Graczyk, supra,* 184 Cal.App.3d at page 1007.

[19] *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 [application of Supreme Court interpretation of prior law that co-employee is not personally liable for sexual harassment cannot be changed by an amendment imposing liability, despite provision that amendment is clarification of existing law, absent clear indication retroactive application intended]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841, 844 (*Myers*) [repeal of tobacco industry immunity prospective absent clear indication by Legislature retrospective application intended]; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 [guest statute not retroactive since ordinary negligence action by passenger against driver is vested right based on common law]; *Graczyk, supra,* 184 Cal.App.3d at pages 1005-1008.

prospective application is mandated.[20] A statute is said to apply "retroactively" when legal consequences of past regulated conduct are affected.[21] A newly enacted statute that affects only procedure and not substantive rights is said to be "prospective" when it is applied to procedures that subsequently arise in litigation.[22]

II. New Section 5814 Is Applicable

SCIF contends that new section 5814 should have been applied, since it became operative and former section 5814 was inoperative before the WCAB majority affirmed

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[20] *Myers, supra,* 28 Cal.4th at page 841; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 [procedural part of Proposition 115 may be applied prospectively to trial for crime committed before measure approved].

[21] *Evangelatos, supra,* 44 Cal.3d at pages 1207-1208; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 392 (*Aetna Casualty*). In *Aetna Casualty*, the Supreme Court explained that "a statute changing the measure or method of computing compensation for disability or death is given retrospective effect when applied to disability or death resulting from an injury sustained before the effective date of the statute." (*Aetna Casualty, supra,* 30 Cal.2d at pp. 392-393.) Such statutes are not applied retroactively unless clearly intended by the Legislature. (*Ibid.*) The Supreme Court ruled that, because the law in force on the date of injury normally determines the right of recovery in workers' compensation, a Labor Code amendment after the date of injury which increases indemnity is substantive and should be applied prospectively. Statutes that change remedies or procedures apply to pending cases, but application is considered prospective. (*Id.* at p. 394.) See also *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 1028, 1031 [repeal of voluntary vocational rehabilitation requiring employer to provide benefit is substantive and not retroactive to date of injury before amendment].

[22] *Aetna Casualty, supra,* 30 Cal.2d at page 394; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123 [procedural change to Code of Civil Procedure requiring trial within five years of filing suit held applicable to pending action, and not violation of due process, since plaintiff had a year to bring case to trial after amendment]; *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 918 [Labor Code amendment after date of injury allowing settlement of vocational rehabilitation applies prospectively as procedural rather than substantive change in calculating liability]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1977) 71 Cal.App.3d 133 [procedural amendment after date of injury allowing employee instead of employer to choose treating physician applies].

the WCJ's award. In addition, new section 5814, subdivision (h) states the section applies to all injuries. Only if there is a final order, decision, or award, which there is not, does Section 47 of S.B. 899 preclude application of new section 5814.

Singleton responds that the Findings and Award and Orders is an "existing order, decision or award" within the meaning of Section 47, so the former law applies because new section 5814 does "not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award."[23] Moreover, Section 47 does not mention final order, and the Legislature added the word "existing" in the repeal of former section 4062.9[24] for similar reasons.

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[23] Singleton cites *Scheftner v. Rio Linda School District* (2004) 69 Cal.Comp.Cases 1281 (*Scheftner*). In *Scheftner*, a WCAB en banc majority decided that new apportionment statutes based on causation under S.B. 899 are not applicable if there is an "existing order" before April 19, 2004, such as a significant order that closes discovery at a mandatory settlement conference or an order of submission after trial. However, review was granted in *Scheftner* by the Third Appellate District on February 3, 2005 and is not citable authority.

Singleton also cites *Myers v. Workmen's Comp. App. Bd.* (1969) 2 Cal.App.3d 621 [interest under section 5800 runs from award substantially affirmed] and *Myers v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 120 [interest is from decision before remittitur where decision basically affirmed] as long-standing authority that courts consider the date of the WCJ's award as the effective date of the award, even if the award is somewhat modified later.

[24] Section 4062.9 was amended in 2003 and subdivision (d) provided: "The amendment made to this section by SB 228 of the 2003-04 Regular Session shall not constitute good cause to reopen or rescind, alter, or amend any order, decision, or award of the appeals board."

Section 4062.9 was repealed by Section 46 of S.B. 899 which states: "The repeal of the personal physician's or chiropractor's presumption of correctness contained in Section 4062.9 of the Labor Code made by this act shall apply to all cases, regardless of the date of injury, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

For the reasons set forth in *Green*, we conclude that new section 5814 applies in this case, and the Findings and Award and Orders is not an "existing order, decision, or award" within the meaning of Section 47.[25] Under these circumstances we apply the rule that rights end with a statute's repeal during litigation, and the court is obligated to apply the laws in effect, even during appeal, in the absence of a contrary legislative intent.[26] As we also stated in *Green*, no such legislative intent exists; on the contrary the Legislature intended the new law to apply to cases like this one. Consequently, the WCAB was obligated to apply new section 5814 on reconsideration, and remand is required.

III. Unreasonable Delay

SCIF argues that the prescription provided by Singleton did not comply with the Stipulation, and the 30-day limit was never triggered; the WCAB majority unfairly ignored these facts, and speculated that the deadline would not have been met even if Singleton provided the correct prescription; and instead, SCIF obtained the correct information from PMSI, and supplied the appropriate wheelchair in a timely manner.

Singleton counters that SCIF unreasonably delayed since Sepasi waited 19 days before contacting PMSI, which left only five working days to acquire and deliver the

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[25] During oral argument, Singleton cited *DuBois* and the cases cited by the Supreme Court at pages 396 to 397, suggesting that an award which increases compensation reopens, rescinds, alters or amends the original award of compensation, and application of new section 5814 is precluded by Section 47. We reject the assertion that the Legislature intended such an interpretation. Singleton's petition for increased compensation was filed more than five years from the date of injury, and thus the award of increased compensation is arguably more in the nature of enforcement. (See *Santillan v. Kay Mart Co.* (1971) 36 Cal.Comp.Cases 12; *City & County of San Francisco v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 544.) Accepting Singleton's suggestion may lead to inconsistent results for awards of increased compensation within five years of the date of injury. Inconsistent results could not have been intended by the Legislature. (*DuBois, supra,* 5 Cal.4th at pp. 388-389; *Moyer, supra,* 10 Cal.3d at p. 230.)

[26] *Governing Board, supra,* 18 Cal.3d at pages 829, 831; *People v. Bank of San Luis Obispo, supra,* 159 Cal. at pages 77, 79-80; *Beckman, supra,* 4 Cal.App.4th at pages 488-489; *Graczyk, supra,* 184 Cal.App.3d at pages 1006-1007.

wheelchair. Then more delay was caused by negotiation of the already discounted price, and the excuse for the reduction is a fabricated bill review. In addition, SCIF failed to advise Singleton's counsel of the meeting with his client, and PMSI improperly convinced Singleton ex parte that a different wheelchair was needed other than that prescribed by the treating physician.

Although it appears to us that both SCIF and Singleton share some responsibility for the delay, we need not resolve that matter.[27] The WCAB decided the case under prior law, and new section 5814 provides different criteria in assessing increased compensation due to unreasonable delay. The law now includes the provision that in "any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties." (§ 5814(a).) Although this requirement is statutorily new, it appears to have its genesis in *County of San Luis Obispo, supra,* 92 Cal.App.4th at pages 874-879. Under prior case law, an employee's contribution in the events leading up to the delay was to be considered in determining whether delay was or was not unreasonable. (*Id.* at p. 878.) Here, given the evidence that both Singleton and SCIF were in part responsible for the delay, the WCAB, and not this court, should have the opportunity in the first instance to decide whether the legislative adoption of the "fair balance" test affects any award of increased compensation.

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[27] The record indicates that delay was caused by both SCIF and Singleton in the provision of the motorized wheelchair. Singleton apparently submitted a prescription from the treating physician that did not meet all of the requirements of the Stipulation. Her allegation that the unreasonable delay was due to an ex parte meeting and the unnecessary procuring of a different wheelchair is not part of the record, although Sepasi was cross-examined at trial. On the other hand, there is a significant history of unreasonable delays, Sepasi had no explanation why approximately 18 days elapsed before the prescription was processed, and the delivery of a different wheelchair for Singleton's serious medical condition took more than 30 days.

DISPOSITION

The WCAB's award of increased compensation under former section 5814 is annulled and the matter is remanded for application of new section 5814, and for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.